IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 43 of 1984

BADRI NARAYAN RATAN LAL & ORS.
V/S
NATH MAL

Mr. MC BHOOT, for the appellant / petitioner

Mr. VIKAS BALIA, for the respondent

Date of Order : 6.7.2006

HON'BLE SHRI N P GUPTA,J.

ORDER

This is defendants' appeal against the judgment & decree of learned Additional District Judge, Nagour Camp Didwana dt. 10.11.1983, reversing the judgment & decree of Munsif & Judicial Magistrate Ist Class, Didwana dt. 24.1.1983, and thereby decreeing the plaintiff's suit, directing the defendant to hand over the possession of the premises within six months.

This appeal was admitted on 7.8.1984, by formulating the substantial question of law, being as to whether the documents Ex. 1 and Ex. A-1 executed by the parties taken together amounted to determination of tenancy by surrender, implied or express?

The facts of the case are, that the plaintiff filed a suit, purportedly for delivery of possession. This

suit was subsequently amended, as there was some mistake in the mention of date of the document.

The case of the plaintiff is, that on 23.11.1974 written agreement was entered into between the plaintiff, and the defendant no.1 firm, through partner defendant no.2, in compliance whereof the defendant paid Rs. 3200/- to the plaintiff, and the plaintiff delivered the premises to the defendant, on the condition that, on repayment of Rs. 3200/- by the plaintiff, the defendant will return the possession, the defendant will not be entitled to any interest of the amount, and till the amount is repaid the defendant will be entitled to use the premises, and on repayment of the amount, the defendant will vacate the premises on its convenience. It is then alleged, that the plaintiff offered the amount, and asked for delivery of possession but to no good. Thereupon a notice was given through Advocate, whereupon the defendant demanded the copy of the agreement, which was sent but possession was not delivered, on the pretext, that it is to be delivered only on convenience. The plaintiff's case further is, that the plaintiff is depositing the amount of Rs. 3200/- in performance of his part of the contract, and therefore, the possession be got delivered to him. Then, in para-5, the plaintiff's requirement was pleaded, and measne profits, @ Rs. 10/- per day was claimed. It is with these averments, that the decree has been prayed for possession, and for

mesne profits.

The defendant filed a written statement to the amended plaint, denying the story pleaded by the plaintiff, and submitted, that the facts pleaded by the plaintiff are incomplete, and that neither the plaintiff tendered the amount, nor there was any occasion for vacating the premises. It was pleaded that the suit was filed on 30.5.1979 while the amount has been deposited in the Court on 24.7.1979, thus the suit is premature, and the plaintiff is not entitled to maintain the present suit. It was also pleaded that the defendant filed application for refund of the amount on two occasions but the amount was not paid. It was then pleaded that the plaintiff had also executed an agreement in favour of the defendant on 23.11.1974, stipulating that the defendant will not be entitled to any interest on the amount, and the plaintiff will not be entitled to any rent, and that the defendant may vacate the premises at his convenience, and at that time plaintiff will repay back the amount, and if the plaintiff pays the amount earlier, he would be entitled to rent. Thus, according to the defendant, on the plaintiff's refunding the amount of Rs. 3200/-, he would start receiving rent. It was also pleaded, that the stipulation in the agreement said to have been executed by the defendant also comprehends that the premises will be vacated as and when the defendant desires to vacate, while the defendant needs

the premises for himself. It was also pleaded that the plaintiff is not entitled to get the possession of the premises, in view of the protection available under the Rajasthan Premises (Control of Rent & Eviction) Act, 1950, hereafter referred to as the Act. Another stand taken was, that the plaintiff, in order to circumvent the provisions of the Act has twisted story, by pleading the document dt. 23.11.1974, to be an agreement, which is not permissible. In substance, the suit is suit for eviction.

Rejoinder, additional rejoinder, and sur-rejoinder etc. were all filed, the plaintiff maintaining that on deposit of the amount the defendant is bound to vacate the premises.

The learned trial court framed five issues. The first issue being as to whether the plaintiff is entitled to get possession of the premises from the defendant by paying Rs. 3200/- in accordance with the agreement dt. 23.11.1974. The second issue was as to whether the plaintiff is entitled to mesne profits @ Rs. 10/- per day. The third issue was as to whether the suit is premature, and the fourth issue was as to whether the defendant is in possession of the premises as tenant since 1971. The fifth issue was obviously about relief. After recording the evidence of the parties, learned trial court decided issue no.1 holding, that the plaintiff would be entitled to

possession of the property at the convenience of the defendant, after the plaintiff paying Rs. 3200/-. Then, issue no. 2 was decided against the plaintiff. Then, deciding issue no.3 it was held, that since the amount was deposited after one month and 24 days of the filing of the suit, the suit is premature. Then, deciding issue no.4 it was found, that the defendant is established to be a tenant in the premises since 1971. Thus, the suit was dismissed.

On appeal by the plaintiff, the learned lower Appellate court adopted an entirely different approach, inasmuch as, it proceeded to go into the question about the effect of recital in the agreement Ex.-1, about the defendant vacating the premises at his convenience, and noticed the contention of the defendant, that this stipulation meant that he would vacate when he is sought to be evicted in accordance with law. Thus, the question was formulated, as to whether the defendant is a tenant in the premises since 1971. Then, in para-12 it was observed, that admittedly, prior to the agreement, the plaintiff was receiving the rent of the premises, and observed, that the case of the plaintiff is, that by virtue of Ex.-1 the tenancy has come to an end, and that by reading two documents Ex. 1 and Ex. A-1 together, it appears, that the tenancy had come to an end by implied surrender, and it was not a case of suspension of tenancy. However, it was also held, that the findings of the learned Magistrate, about

the defendant being tenant since 1971 is not established, rather the factual position is that the premises was on rent since 1971, but in view of the documents Ex.1 and Ex.A-1 the tenancy came to an end, and thus the relationship of landlord and tenant came to an end. Then the two documents were read as reciprocal contracts, and it was found, that the suit is not premature, and consequently the above decree has been passed.

Arguing the appeal, it was contended by the learned counsel for the appellant, that the suit, as framed was wholly misconceived, and could not be maintained, as a matter of law, inasmuch as the suit purported to be a suit for recovery of possession of Kotha, but in substance it purported to be suit for specific performance of the agreement Ex.1, while as a matter of fact, even taking on the face value, Ex.1 creates a usufructary mortgage of the immovable property for a sum of Rs.3200/-, inasmuch as according to the plaintiff the possession was transferred to the defendant under the agreement, with the stipulation that the amount will not carry interest and the premises will not carry any rent, and the defendant will be entitled to retain the possession till the amount is paid, and since such mortgage is required to be made only by registered instrument, the document Ex.1 could not be sought to be enforced as an agreement, by filing the suit for specific performance, in the garb of suit for possession. It was

then submitted, that even if the present suit is taken to be a suit for redemption, as the plaintiff purported to deposit the mortgage amount, since the document Ex.1 is not admissible in evidence, for want of registration, it can also not create any mortgage, and creates no right in the plaintiff, to file the present suit. Regarding the approach adopted by the learned Lower Appellate Court it was submitted, that the plaintiff had not come in the suit with the case, of defendant being tenant earlier and by Ex.1 the tenancy having been surrendered so as to entitle the plaintiff to possession, rather it was defendant, who came with the version, that he is tenant since 1971. The question as to whether the tenancy was surrendered or was suspended vide Ex.1, is a question, dependent on intention of the parties, which obviously is a question of fact, therefore, it was required to be pleaded clearly, so as to enable the defendant to effectively controvert it, but that having not been done, it was not open to the learned Lower Appellate Court, to go into the question by itself, and find it a case of implied surrender of the tenancy, which was never the case of the plaintiff.

It was also contended, that at best the plaintiff could have filed the suit for eviction, if any of the grounds permissible under the Act were available, having not done so, the suit as framed and filed is wholly misconceived, and could not be decreed.

On the other hand, learned counsel for the respondent supported the impugned decree, while placing reliance of Ex.1, which clearly stipulated, that on receiving the amount, the defendant was to deliver possession, and since the amount has been deposited, defendant is not entitled to retain possession. So far the recital about convenience is concerned, it is contended, that this recital is required to be construed in a reasonable manner, and is not intended to provide a lever to the defendant, to avoid delivery of possession ad infinitum. The other submission made is, that since in Ex.1 there is a clear stipulation, to the effect, that on payment of the amount by the plaintiff, the defendant would deliver back the possession, may be on convenience of the defendant, still, since there is stipulation for delivering back the possession, it clearly tantamounts to implied surrender of tenancy rights, by the tenant-defendant, and since the plaintiff has deposited the amount, which has been withdrawn by the defendant, the plaintiff is entitled to be delivered back possession. Thus, no interference is required to be made in the impugned decree.

I have considered the submissions and have gone through the record. What is significant to note is, that a look at the statement of the plaintiff, as P.W.1, does show that both the documents Ex.1 and Ex.A-1 are admitted

documents. Of course the plaintiff has his own stories to explain out the stipulation A to B in Ex.A-1, and the defendant has his own version for explaining the stipulation of convenience in Ex.1, but then, the fact remains, that both the documents are admitted ones.

In that view of the matter, on the face of the substantial question of law as framed, I am required to adjudicate, as to whether the two documents Ex.1 and Ex.A-1 taken together, amount to determination of tenancy by surrender, express or implied. Obviously surrender of tenancy is a positive act on the part of the tenant. The surrender may be express or implied. If it is an express surrender, there has to be some positive act on the part of the tenant in surrendering the tenancy, and if it is a case of implied surrender, then there should be circumstances, from which it must be deducible by the court, that the tenancy was surrendered. Admittedly, a reading of the two documents does not show any stipulation to have been incorporated therein, to make out a case of express surrender of tenancy. In that view of the matter, the only question remains to be considered is, as to whether the two documents constitute implied surrender. Implied surrender obviously is a question of fact, where the circumstances, sequence of events taking place, and the intention of the parties at the relevant time, are the factors, which enables the Court to deduce, as to whether the defendant

intended to surrender, so as to infer implied surrender. That being the position, the plaintiff has to clearly plead in the plaint, that the defendant surrendered the tenancy, or that by sequence of events pleaded, it should be inferred that the defendant surrendered the tenancy. Thereupon it is obviously open to the defendant to contest or controvert the averments, and then after appreciating the evidence produced by the parties, the Court may come to any conclusion either ways, as may flow from the evidence. As against this, in the present case, from a look at the plaint, it is more than clear, that there is not even a whisper on the side of the plaintiff, about any surrender of the tenancy, express or implied, to have been made by the defendant, so much so, that the plaintiff has not even chosen to disclose, that the defendant was already a tenant in the premises since 1971, rather the very precise and categoric case of the plaintiff was, that the defendant was delivered possession of the premises under Ex.1, by receiving Rs.3200/-, by way of loan, and the possession was to be received back on payment of the amount, and in the intervening period, the premises were not to yield any rent, and the loan was not to yield any interest. Thus, when the plaintiff himself, even did not disclose the defendant to be tenant, already existing in the premises, it cannot be said, that at least according to the plaintiff the defendants surrendered the tenancy. So far the version of the defendant is concerned, he is categoric, that he

never surrendered the tenancy, rather he relies upon Ex. A/1 to contend, that it was on the contrary, stipulated that on payment of the amount of Rs. 3200/- by the plaintiff, he would start receiving the rent, which shows, that the tenancy was rather expressly survived, and only stood suspended during the period the plaintiff enjoys the amount received by the defendant. It is in this background, that the plaintiff has admitted the stipulation A to B in Ex. A-1 to have been incorporated therein, and realising the effects of this stipulation, while in the witness box, has made feeble attempt to wriggle out, by trying to explain the stipulation to mean, that if the amount is paid within particular time, and possession is not received within particular time, then he would be receiving rent, and so on. Admittedly there is no basis for all these explanations.

Thus, coming simply to the aspect of answering substantial question of law, as formulated in the order dt. 7.8.1984, the question is required to be answered in favour of the appellant, to the effect, that the two documents Ex. 1 and Ex. A-1 taken together, in conjunction with the attending circumstances, including the pleadings of the plaintiff and the defendant, or the statement of the plaintiff as P.W.1, it does not constitute any surrender of tenancy, whether express or implied.

The above findings are sufficient to set aside the impugned judgment and decree, as the very basis of the impugned judgment stands knocked down.

However, the matter does not end here, inasmuch as, the plaintiff has filed the suit for recovery of possession on the basis of Ex.1, it is required to be considered, as to whether, even de-hors the above findings, the plaintiff could be held entitled to such a decree, and in my view, the answer obviously is in the negative. It is not in dispute, that the stipulations contained in Ex.-1, do tantamount to usufructary mortgage. In my view therefore the only remedy available to the plaintiff can be the suit for redemption of mortgage, and not by way of filing suit for specific performance, under the garb of a suit for recovery of possession. Admittedly, the plaintiff has not approached the Court under Section 83 of the Transfer of Property Act, and in view of the fact, that the document Ex. 1, or for that matter even Ex. A-1, being not registered documents, they do not, by themselves can be said to be creating usufructary mortgage. I am aware that such unregistered documents, in view of the judgment of this Court in Lachhmi Narayan Vs. Kalyan, reported in AIR 1960 Raj.-1, can be looked into for collateral purposes, and the mortgagee can perfect his possession as mortgagee on completion of prescriptive period, the obvious consequence of this logic is, that at best, the plaintiff

may be entitled to maintain the suit for redemption after the mortgage acquired validity, as contemplated in Lachhmi Narayan's case, but in the present case, the suit has been filed even within less than five years of Ex.-1, therefore, also the plaintiff cannot maintain the present suit. Thus, taken from any stand point, the plaintiff is not entitled to any decree for possession as prayed.

I find from the record that in this appeal by interim order the execution of decree was stayed, on the condition of mesne profits, at the rate mentioned therein. In the totality of circumstances, I am inclined, even while accepting the appeal, to direct and clarify, that the mesne profits/damages for use and occupation, if deposited by the appellant, in compliance of the said directions, shall be absolutely retained, without any further accountability. However if whole or any part of such amount is not deposited by the appellant, then in that event however the plaintiff shall not be entitled to lay any claim, for that amount on the strength of the said interim order.

Before parting with the case, it is required to be noticed that admittedly vide Ex.-1 the plaintiff intended to create usufructary mortgage in favour of the defendant for a sum of Rs. 3200/-. Such document of mortgage was required to be executed on stamp, as prescribed by the Stamp Act, prevalent at that time, and that having not been

done, exercising my powers under Section 33 of the Stamp Act, the document Ex.-1 is impounded, and is directed to be forwarded to the competent authority under the Stamp Act, to adjudicate the leviable stamp duty, and penalty, and to recover the same from the person liable, in accordance with law.

In the result the appeal is allowed. The impugned judgment & decree of the learned lower Appellate Court is set aside, and the plaintiff's suit is dismissed. The parties shall bear their own costs. The document Ex.-1 is impounded. It be forwarded to the competent authority for needful as directed above.

(N P GUPTA),J.

/Sushil/